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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-498

ROBERT OLFF, a minor, by and through his guardian Ad Litem, Mrs. Sonny Olff, *Petitioner,*

vs.

EAST SIDE UNION HIGH SCHOOL DISTRICT, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Petitioner Robert Olff, by and through his Guardian ad litem, Mrs. Sonny Olff, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the United States District Court for the Northern District of California which had held that a public high school district violated petitioner's rights when it suspended him solely be-

cause his hair was longer than the district decreed it should be.

OPINIONS

The Opinion of the United States Court of Appeals, not yet reported, is reproduced as Appendix A herein. The decision of the District Court is reported at 305 F.Supp. 557 (N.D. Cal. 1969) and is reproduced as Appendix B herein.

JURISDICTION

The Opinion and Judgment of the Court below were entered on July 25, 1971, reversing a decision of the United States District Court for the Northern District of California granting petitioner relief. By order entered on September 22, 1971, Mr. Justice Douglas extended petitioner's time in which to file a petition for Writ of Certoriari to and including October 7, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a public school may exclude a male student solely because he adopts a "natural" hair fashion which is longer than the school authorities decree hair should be worn.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

United States Constitution, Ninth Amendment:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Fourteenth Amendment:

> ". . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

East Side Union High School District, Policies pertaining to student behavior, boys:

> "Hair shall be trim and clean. A boy's hair shall not fall below the eyes in front and shall not cover the ears, and it shall not extend below the collar in back."

STATEMENT OF THE CASE

On September 22, 1969, when the instant action was filed in the District Court, petitioner was a fifteen-year-old student in good standing entering his junior year at James Lick High School, East Side Union High School District, San Jose, California. [C.T. 1].

Twelve days earlier, on September 10, 1969, the office of the principal at James Lick High School had

informed petitioner that he would not be able to attend high school because his hair fashion did not conform with a school regulation which provided, in pertinent part, "Hair shall be trim and clean. A boy's hair shall not fall below the eyes in front and shall not cover the ears, and it shall not extend below the collar in back."

Petitioner in fact kept his hair neat and clean. It was the length of his hair (a "natural" hair fashion) which resulted in his exclusion from school. Petitioner complained to the Court that he was arbitrarily being denied an education and that the school hair regulation: 1) violated his right of free expression; 2) violated his right to privacy in his personal life; 3) violated the equal protection of the laws in that female students were permitted to wear their hair at any length they chose; and that 4) the challenged regulation was "an overbroad regulation of the fundamental rights to liberty, free expression and privacy." Petitioner further complained that he had been excluded from school in a manner that denied him due process of law. [C.T. 3-4].

Federal District Judge Robert Peckham, on the day the complaint was filed, isued an order requiring respondent to show cause why the relief petitioner prayed for should not be granted. An evidentiary hearing on the order to show cause was held on September 24, 1969. At that hearing petitioner testified about his reasons for wishing to wear his hair in a "natural" fashion. Respondent, however, introduced no testimony into evidence. Respondent was content

to rely upon affidavits of various school administrators and school teachers as an evidentiary showing. The affidavits set forth various evils that the affiants associated with long hair.

Judge Peckham rendered his decision in favor of petitioner on October 1, 1969. [C.T. 79-83]; *Olff v. Eastside Union High School District,* 305 F.Supp. 557 (N.D. Cal. 1969). In the Findings of Fact and Conclusions of Law, filed November 12, 1969, [C.T. 91-95] Judge Peckham found that petitioner's hair was neat and clean and that "Defendant has not presented any credible evidence showing that plaintiff's hair style is either a safety or health menace to himself or other members of the school community or that it materially and substantially interfered with the requirements of appropriate discipline or the operation of the school."

On Appeal, the United States Court of Appeals for the Ninth Circuit reversed the District Court, concluding it "could care less" about male hair styles and that the judgment of administrators should not be interfered with even though no material or substantial disruption had occurred.

REASONS FOR GRANTING THE WRIT

A. The Courts of Appeal are in conflict.

Compare *Breen v. Kahl,* 419 F.2d 1034 (7 Cir. 1969) *cert. denied,* 398 U.S. 937 (1970) and *Richards v. Thurston,* 424 F.2d 1281 (1 Cir. 1970) with the opinion

below in this case, *Jackson v. Dorrier,* 424 F.2d 213 (6 Cir. 1970), *cert. denied,* 400 U.S. 850 (1970), and *Ferrell v. Dallas Independent School District,* 392 F.2d 697 (5 Cir. 1968) *cert. denied* 393 U.S. 856 (1968).

B. The Rule Obtaining in the First and Seventh Circuits is the Sounder Rule.

It was not so very long ago that this Court said:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder [Citation]. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."
>
> *Pierce v. Commonwealth of Massachusetts,* 321 U.S. 158, 166 (1944).

It is not possible to square that cardinal principle with the result below in this case. Petitioner wears his hair in a "natural" fashion which reflects pride in his heritage. His mother shares his sentiments. She considers it important that her son continue wearing his hair in its present style. But the state has stepped in, telling mother and son that a "natural" fashion will not do, and that petitioner will have to wear his hair shorter. If shorter, of course, it will be shorter both at school and at home; the home where that "private realm of family life" is conducted. And for what reason does the state dictate to a child, over his mother's objection, how he should look? Why for nothing that

can fairly be called a reason at all. The record in this case demonstrates no state interest advanced by the regulation of petitioner's person other than a neurotic aversion to hair over a male's ears. Nothing in the record suggests that petitioner's "natural" hair style has disrupted or in anyway interfered with school activities. The District Court held that petitioner's expulsion was supported by no "credible evidence" that it promoted any legitimate government concern. [C.T. 92].[1]

Under the circumstances, requiring petitioner to cut his hair in order to attend school is as objectionable as requiring him to straighten it in order to attend school or requiring a middle-aged man to grow his hair long as a condition to receipt of some public benefit.[2] In a free society, the state simply cannot enforce

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[1]The Court of Appeal thought it significant that there was "expert" opinion, reflected in affidavits filed in the District Court, to the effect that long hair on males is a bad thing. App. A, p. xv. The "experts," however, were able to point to no concrete examples of long hair creating any real problems. The "experts" views, when analyzed, are nothing more than an affirmation by school officials that a policy enforcing their personal predilection for short hair on boys is a policy they support. One expert informed the District Court it was his "belief" "that boys with excessively long hair are a natural attraction and target to those who would push drugs". [C.T. 50]. Another furnished the Court with this "professional" judgment: "Males who wear long hair are frequently among those who refuse to salute the American flag . . ." [C.T. 273]. It is easy to see why the District Court could find no "credible evidence" supporting any legitimate purpose served by state controls on petitioner's hair fashion. Blind prejudice is blind prejudice and nothing more. An expert's mantle cannot obscure that fact.

[2]The example of a middle-aged man being denied state benefits unless he abandons his crew-cut is not at all far-fetched. It is only a matter of time. Hair fashion has been a pendular orthodoxy. In the early days of this Republic short hair was considered a sign of decadence, a symbol of alliance with French "anarchy, radical-

orthodoxy of appearance for no reason other than state preference. In a society that loves liberty we must be able to project our personality, and affect the symbols congenial to those with whom we wish to be associated, free of state interference absent the most compelling justifications. The state cannot have the power to force us to adopt a hair fashion with which we are uncomfortable. One generation cannot employ the awesome powers of the state for the purpose of compelling another to wear symbols of a fading orthodoxy.

CONCLUSION

Hair has been the subject of federal litigation before. In the latter part of the Nineteenth Century, Sheriff Nunan of San Francisco adopted a rule requiring all prisoners to cut their hair within an inch of the scalp. The regulation had a particularly harsh impact on the Chinese who wore their hair with long queues to which they attached religious significance. Ho Ah Kow brought suit under the federal civil rights act; Nunan responded that the regulation was not arbitrary and that it served legitimate ends by promoting health and safety. Justice Field, sitting as a Circuit Justice, was unimpressed with the justification. The regulation was struck down as "cruel and unusual punishment" in violation of the Constitution:

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ism and immorality." Severn, *The Long And Short Of It*, p. 87 (1971). And in the cradle of democracy, when Diogenes made his search for an honest man, he systematically excluded from scrutiny the short-haired and clean-shaven. He considered them effeminate and weak. *Id* at 24.

> "The cutting off the hair of every male person within an inch of his scalp, on his arrival at jail, was not intended and cannot be maintained as a measure of discipline or as a sanitary regulation. The act by itself has no tendency to promote discipline, and can only be a measure of health in exceutional cases."
>
> *Ho Ah Kow v. Nunan,* 12 Fed. Cas. 252, 254 (No. 6,546) (C.C.D. California 1879)

The rule of *Ho Ah Kow,* the rule that should govern the instant case, was eloquently capsulized by Judge Cooley in his note on the case in 18 Am.Law. Reg. 685:

> "There is and can be no authority in the state to punish as criminal such practices or fashions as are indifferent in themselves, and the observance of which does not prejudice the community or interfere with the proper liberty of any of its members. No better illustration of one's rightful liberty in this regard can be given than the fashion of wearing the hair. If the wearing of a queue can be made unlawful, so may be the wearing of curls by a lady or of a mutache by a beau, and the state may, at its discretion, fix a standard of hair-dressing to which all shall conform. The conclusive answer to any such legislation is, that it meddles with what is no concern of the state, and therefore invades private right. The state might, with even more color of reason, regulate the tables of its citizens than their methods of wearing their hair; for the first might do something towards establishing temperance in eating, while the other would be simply absurd and ridiculous.

> ". . . The wearing of the hair in this way is no more unhealthy than female fashions of the hair in general, and the convict can be kept as well with it on as with it off. The regulation for the cutting off of the queue is, therefore . . . illegitimate and illegal." Quoted in footnote to *Ho Ah Kow v. Nunan, supra,* 254-255.

For that reason, and all the reasons mentioned, petitioner respectfully urges that this petition for writ of certiorari should be granted.

Dated, October 5, 1971.

Respectfully submitted,
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ELLIOT G. STEINBERG,
By PAUL N. HALVONIK,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Lindahl King; and Mark Carlson, Michael Martin, John Kindel and John Urray, minors appearing by their Guardians Ad Litem, Plaintiffs-Appellees, v. Saddleback Junior College District, a public corporation; Fred H. Bremer, Superintendent, Defendants-Appellants,	No. 26,452

Appeal from the United States District Court
for the Central District of California

Robert Olff, a minor, by and through his guardian Ad Litem, Mrs. Sonny Olff, Plaintiff-Appellee, v. East Side Union High School District, Defendant-Appellant.	No. 25,132

Appeal from the United States District Court
for the Northern District of California

[June 25, 1971]

Before: HAMLEY, CARTER and TRASK, Circuit Judges

TRASK, Circuit Judge:

Each of these cases is an appeal from an order of the district court enjoining the enforcement of a provision of a school dress code providing for limitations on the length of hair of male students. The cases were argued and submitted at the same time. They involve issues which are substantially the same. They will be considered together.

No. 25,132 was a petition for injunctive and declaratory relief filed by Robert Olff, a minor, by his guardian ad litem, Mrs. Sonny Olff, against the East Side Union High School District in the United States District Court for the Northern District of California.

No. 26,452 was a complaint for an injunction and for declaratory relief filed by Lindahl King and others against the Saddleback Junior College District and Fred H. Bremer, its Superintendent and the President of the College, in the United States District Court for the Central District of California.

Jurisdiction in each case was invoked below under the Fourteenth Amendment, the Civil Rights Act (42 U.S.C. § 1983), and 28 U.S.C. § 1343 and here under 28 U.S.C. § 1292(a)(1).

Article IX of the California Constitution provides for the establishment of a public school system with County Boards of Education and County Superintendents. Section 5 of that article delegates to the Legislature the duty of implementing this provision.

"The California Legislature is vested with the power to carry out the mandate of the operation of a free public school system in California. (Calif. Const., art. IX § 1.) The Legislature has conferred upon school boards statutory authority to promulgate rules and regulations governing the conduct and operation of public schools. 'Every school district shall be under the control of . . . a board of education.' (Ed. Code, § 921.) 'The governing board of each school district shall prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government.' (Ed. Code, § 925.) All pupils must comply with school regulations. (Ed. Code, § 10609; Calif. Adm. Code, Title 5, Education, art. 7, p. 50 § 62.) A Board of Education of a school district has power to adopt a Code of Pupil Discipline and, as a part thereof, a 'Good Grooming Policy' to insure personal cleanliness and neatness of dress (see Calif. Adm. Code, Title 5, art. 7, §§ 62, 64), providing the rule does not unreasonably infringe upon the exercise of a constitutional right. (*Bagley v. Washington Township Hospital Dist., supra,* 65 Cal.2d 499, 501-502.)" *Akin v. Board of Education of Riverside Unified School Dist.,* 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968), *cert. denied,* 393 U.S. 1041.

It was pursuant to this authority that the East Side Union High School District adopted its "Policies Per-

taining to Student Behavior."[1] The stated objectives were:

"1. To facilitate the teaching and learning situation in the class room.

2. To establish and maintain decorum in the schools and community.

3. To aid our youth in the development of responsible attitudes and habits.

4. To aid in the fulfillment of the responsibility invested in the school by the State of California and the community of the East Side Union High School District." C.T. 7.

The articles covered sixteen subjects including "General Conduct," "Attendance," "Personal Appearance, Cleanliness and Neatness of Dress," "Tobacco," "Alcohol," "Drugs," "Obscenities," "Fighting," and "Hazing." Under the subject of "Personal Appearance" standards are set out for both boys and girls with seven items to be observed by boys and five items to be observed by girls. The item in question here provides:

"c. Hair shall be trim and clean. A boy's hair shall not fall below the eyes in front and and shall not cover the ears, and it shall not extend below the collar in back." C.T. 7.

The "Personal Appearance" section further provides that "a district committee of students, teachers,

[1]The "Policies" were adopted on September 24, 1959, and had been revised 8/64, 10/65, 3/67, 7/68, and 8/69. C.T. 7-10.

administrators and parents shall each year review changing styles as they affect appropriateness of dress for the consideration of the Superintendent."

The Director of Personnel of the district executed an affidavit (C.T. 48-49) stating how this annual review was carried out. She stated that she served as Chairman of a Behavior Code Review Committee which met on four occasions during May and June of 1969. The committee was composed of:

"1. The PTA president from each school.

2. A parent from the 'integrated parents group' from each school (parents from each school representing various ethnic groups);

3. The ASB [Associated Student Body] president elect from each school;

4. Another elected ASB officer of the opposite sex from the president;

5. A teacher from each school;

6. In addition to above a woman counselor from Overfelt and four administrators from various schools in the district were appointed." C.T. 48.

With respect for the result of the annual review, the affidavit states that the following action was taken:

"At the meeting of June 23, 1969, there were 22 members of the committee present of whom seven were students. Referring to article IV, Item C under Boys, the following was voted on and passed by a vote of 20 ayes and 2 noes:

> 'Hair shall be trim and clean. A boy's hair shall not fall below the eyes in front and shall not extend below the collar in back.'"

This affidavit was not controverted.

It was against this backdrop of regulation that Robert Olff, age 15 years, attempted to register as a third year high school student at James Lick High School in San Jose, one of the schools of the East Side Union High School District. The teacher who interviewed him was of the opinion that his hair was in violation of the grooming code and asked him to see one of the vice principals. He did so and was refused enrollment until his hair was made to conform.[2]

Upon the rejection of Olff by the school he filed a complaint seeking injunctive relief, a declaratory judgment and damages. The court directed the school to show cause why a preliminary injunction should not issue enjoining the defendants from excluding the plaintiff. On the return date of that order the plaintiff, Olff, testified briefly, the defendant school district introduced a number of affidavits, and the matter was submitted. The court enjoined the defendant from enforcing the regulation in question and enjoined the defendant from excluding the plaintiff from attending

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[2]At this point we note some confusion about the factual issue as to whether or not the appellee's hair was in violation of the rule. The court made an express finding that it did not violate the grooming code. *Olff v. East Side Union High School District*, 305 F.Supp. 557, 557 (N.D.Cal. 1969). Plaintiff's own counsel at the evidentiary hearing stated that the plaintiff did not consider that this issue was a factual one. R.T. 12. Plaintiff urges the invalidity of the regulation. He does not contend that his hair is not in violation of a valid regulation. We treat the problem as it was presented.

the school. *Olff v. East Side Union High School District*, 305 F.Supp. 557 (N.D.Cal. 1969). We reverse for reasons hereinafter set forth.

The second case, No. 26,452, has been here before. An order for a preliminary injunction was vacated and the cause remanded for further proceedings. *King v. Saddleback Junior College District*, 425 F.2d 426 (9th Cir. 1970). The record does not indicate that any witnesses testified upon trial after remand. Certain exhibits were ordered filed, additional authorities were submitted with memoranda of law and arguments of counsel, and an order and memorandum opinion thereupon issued. The court held that the regulation in question was in violation of both the due process and equal protection clauses of the Fourteenth Amendment. The school district and superintendent appeal. We reverse.

In this case the Board of Trustees also adopted a "Student Handbook" which contained, among other things, a dress code for men and for women. At least three meetings of the Board were held at which the provisions of the code were considered. (Plaintiff's Exh. 2 and 3). It had been prepared by the administration of the school and submitted to the student body whose representative attended the last two meetings and voiced the opinion of the student body. There was some revision and apparent agreement on all items except the regulation concerning hair for men. The students wished it to read "clean and combed."[3] The

[3]"Mr. Kenyon [student representative]: We discussed this in the Dress Code Committe [sic], the idea of the length of hair, and the main thing is we didn't want to get out and start meas-

administration, having in mind the rejection of similar school grooming codes because unconstitutionally vague," desired to eliminate such a problem. (Plaintiff's Exh. 2 at 2). The result was language almost identical with that of the *Olff* case.[4] In neither case was there any evidence that length of hair led to any disruption among students.

The constitutional, statutory and regulatory authority for a junior college is the same as that for a high school, since both institutions are a part of the public secondary school system, of the state. Cal. Educ. Code §§ 5552, 22650 (West 1969).[5]

The authorities in the welter of cases involving men's hair dress versus school regulations are about equally divided in their results, some of which hold the regulation invalid; *e.g., Crews v. Clones,* 432 F.2d 1259 (7th Cir. 1970); *Griffin v. Tatum,* 425 F.2d 201 (5th Cir. 1970) (partially invalid); *Richards v. Thurston,* 424 F.2d 1281 (1st Cir. 1970); *Breen v. Kahl,*

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uring the hair, and that would be the only real way you could set down a specific length of hair. So we tried to think of some words which we felt would not necessarily stipulate the length of hair, but more or less keep it within the idea of good taste, perhaps, and at the same time, we wanted to keep away from the really, really gigantic radical-type hair, so we came up with the words clean and combed. We felt, within the Committee, the Committee felt that a person who has under the interpretation of the Administration, who has clean hair and the hair is also well combed—we thought about putting the words groomed or combed and decided on combed for the present. We felt this would more or less be stipulated so we would not have any gigantic, enormous change." Plaintiff's Exh. 3 at 10.

[4]"Hair which falls below the eyebrows, or covers all or part of the ear, or hangs entirely over the collar of a dress shirt." C.T. 7.

[5]Under an amendment adopted in 1970 the word "community" was substituted for the word "junior" in referring to such colleges as part of the public secondary school system. Stats. 1970, c. 102, pp. 152, 240, §§ 95, 322.

419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970); Crossen v. Fatsi, 309 F.Supp. 114 (D. Conn. 1970), (unconstitutionally vague); and others which uphold the regulation issued by the school authorities; *e.g., Stevenson v. Board of Educ.,* 426 F. 2d 1154 (5th Cir.), *cert. denied,* 400 U.S. 957 (1970); *Jackson v. Dorrier,* 424 F.2d 213 (6th Cir.), *cert. denied,* 400 U.S. 850 (1970); *Davis v. Firment,* 408 F.2d 1085 (5th Cir. 1969), *aff'g per curiam,* 269 F.Supp. 524 (E.D.La. 1967); *Ferrell v. Dallas Indep. School Dist.,* 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1968).[6]

In the two cases before us, reliance by the plaintiffs for a constitutional violation is at the outset placed upon the First Amendment, based primarily on the authority of *Tinker v. Des Moines Community School District,* 393 U.S. 503 (1969).[7]

In *Tinker* a group of people, some of whom had children in school, held a meeting and determined to publicize their objections to the Vietnam war by wearing black armbands during the holiday season. The school authorities, aware of the plan, adopted a policy that any student wearing an armband and refusing to remove it would be suspended. The Court determined

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[6]A recent case note in 84 Harv. L. Rev. 1702 (1971) collects many of the cases and finds a slight edge favoring the school authorities. As might be expected, some of them are decided on deficencies in proof by one side or another. *Id.* 1703-04.

[7]Although plaintiffs in *King* now assert First Amendment protection, the district court in its first opinion said:

> "3. Plaintiffs have made no contention that enforcement of the Dress Code has violated their freedoms of speech or religion." C.T. at 109.

this conduct to be a primary First Amendment right akin to " 'pure speech.' " 393 U.S. at 505, 508.

In the cases before us, neither of the regulations on it face indicates a conflict with freedom of speech. There was no evidence that either regulation was enacted by the respective school authorities with such a purpose in mind. Moreover, the students were not purporting to say anything. Plaintiff Olff flatly stated that his hair style was not a badge or a symbol of any group. On the contrary, he said that he was "a minority of one." R.T. 27.

Certainly within the pleadings and evidence in these cases there was no intention to assert First Amendment rights, whether characterized as "pure speech" or "symbolic speech," nor was any such contention made in the courts below. The activity involved is akin to conduct and the attachment of the label "symbolic speech" does not make it symbolic speech in the absence of circumstances showing it to have been so intended.[8] Therefore, we do not believe that *Tinker,* supra, controls either of these cases since *Tinker* appears to clearly distinguish between rights akin to "pure speech" and those school regulations having to do with personal appearance, style of clothing, or deportment.[9]

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[8]Moreover, even when "symbolic speech" is asserted to have been intended, the Supreme Court has not always been receptive to the argument:

> "We cannot accept the view that an apparently limitless variety of conduct can be labelled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien,* 391 U.S. 367, 376 (1968).

[9] "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to

There is another distinction between these cases and *Tinker*. In *Tinker* the school authorities did not permit an armband to be worn only "so long as it did not exceed" a certain width. The proscription was absolute. In *King* and *Olff*, on the contrary, a male student could express his personality by means of his hair at any length between a short haircut and a long one, limited only so that the hair did not fall below the eyes in front, nor cover the ears, nor extend below the collar in back.[10]

Apart from the First Amendment claims, many of the cases cited rely upon a "right to be let alone," analogizing that right to the right of privacy or to the fundamental liberty of the individual implicit in the Fifth Amendment. Among the cases thus submitted is *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the right of the state to invade marital privacy was proscribed as an undue intrusion. Neither *Griswold* or cases akin to *Griswold* are appropriate here. The conduct to be regulated here is not conduct found in the privacy of the home but in public educational institutions where individual liberties cannot be left completely uncontrolled to clash with similarly

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hair style, or deportment. *Cf. Ferrell v. Dallas Independent School District*, 392 F.2d 697 (1968); *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923)." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969).

[10]Dr. Bremer, the Superintendent of Saddleback, in his affidavit stated that a student could also be in compliance without cutting his hair.

> "The Saddleback College Dress Code regulation of male hair styles does not require that hair be cut to any particular length and compliance achieved by means of styling of the hair by means of a headband, for example, is acceptable." Plaintiff's Exh. 11.

asserted liberties of several thousand others.[11] This is not to say that persons within the school system as students do not retain their constitutional rights. For, as has often been repeated,

> "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." *Tinker v. Des Moines School Dist., supra,* at 511.

Litigants and courts alike, notwithstanding the frequent assertion of theories based on the First Amendment and the right to privacy, have had difficulty in reaching a consensus on which constitutional provision, if any, affords the protection sought here. Some litigants have tried the "shot gun" approach, asserting claims under several amendments, *Jackson V. Dorrier,* 424 F.2d 213 (6th Cir.), *cert. denied,* 400 U.S. 850 (1970),[12] while some courts have found relief in the equal protection clause of the Fourteenth Amendment, *Dunham v. Pulsifer,* 312 F.Supp. 411 (D. Vt. 1970), or *somewhere* within the First or Ninth Amendments,

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[11]Even Judge Cooley's oft quoted statement (*see Richards v. Thurston,* 424 F.2d 1281, 1285) that "The right to one's person may be said to be a right of complete immunity: to be let alone," does not hold true in all circumstances. *See, e.g., Schmerber v. California,* 384 U.S. 757, 759 (1966); *Breithaupt v. Abram,* 352 U.S. 432, 439 (1957); *Raderman v. Kaine,* 411 F.2d 1102 (2nd Cir.), *cert, dismissed,* 396 U.S. 976 (1969).

[12]In *Jackson v. Dorrier* claims were asserted of violation of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. 424 F.2d at 218.

albeit unspecified. *Breen v. Kahl,* 419 F.2d 1034 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).[13] No doubt their confusion is fostered by the tenuous nature of the right asserted.

The district court in Olff, quoting from Judge Wyzanski's opinion in *Richards v. Thurston,* 304 F.Supp. 449, 452 (D. Mass.), *aff'd,* 424 F.2d 1281 (1st Cir. 1969), held that plaintiff's claim to " 'liberty to express in his own way his preferences as to whatever hair style comports with his own personality and his search for his own identity' " was protected under the "broad terms" of the due process clause of the Fourteenth Amendment from what the court found was a lack of a "rational" ground for regulation.[14] *Olff v. East Side Union High School District, supra,* at 559. And the court in *King* found both due process and equal protection violations.

EQUAL PROTECTION

There was no evidence of racial discrimination or that the regulation in either case was applied in other

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[13] Whether this right is designated as within the 'penumbras' of the first amendment freedom of speech, . . . or as encompassed within the ninth amendment . . . it clearly exists. . . ." *Breen v. Kahl,* 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied,* 398 U.S. 937 (1970).

[14] It should be noted that in *Richards v. Thurston,* 304 F.Supp. 449 (D. Mass.), *aff'd,* 424 F.2d 1281 (1st Cir. 1969), there was no evidence of a formal written regulation of the school authorities setting maximum hair length, nor evidence of any justification arising out of health, performance, or disciplinary concerns. In fact, the court found no reason for the school principal's suspension of the plaintiff "except possibly the principal's personal prejudice, the community conventions of the first half of the twentieth century, and the views of some contemporaries, who may or may not be a majority of Marlboro's population, or of its parents, or of its students." 304 F.Supp. at 451.

than in an even-handed manner, nor was there any evidence of unequal protection other than the assertion that boys were treated differently than girls; *i.e.*, girls could have long hair and boys could not. We do not consider the latter difference in treatment or classification as creating any substantial constitutional question.

DUE PROCESS

In examining the due process aspect of the argument, in order to discover whether a rational basis for regulation exists, we find, as previously described, clear expressions of authoritative bodies giving to the school boards in California the right to establish regulations for the day to day operation of its school. Cal. Educ. Code § 925 (West 1969). There is also a statute and a similar administrative regulation which impose a *duty* upon the student to comply with the board's regulations. Cal. Educ. Code § 10609 (West 1969); 5 Cal. Adm. Code § 300.[15] Those regulations must be lawful, of course, but given this state interest and authority to regulate within constitutional bounds we would assume that some regulations necessary for the day to day operation of schools, classes, and the general educational processes, are permissible. We would also assume that in the absence of a clear violation of a constitutional right, the burden is upon those who assail the regulation to prove their invalidity. This they have not done here.

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[15] "All pupils shall comply with the regulations, pursue the required course of study, and submit to the authority of the teachers of the schools." Cal. Educ. Code § 10609 (West 1969).

On the other hand, the school district in *Olff* presented affidavits of eleven teachers and administrators in the high school district, whose disclosed experience ranges from two and one-half years to seventeen years. Each of these officials voices an opinion based upon his or her professional experience that extreme hair lengths of male students interferes with the educational process. Each of the opinions might be debated to some extent as was done by the trial court. The fact remains, however, that the affidavits are from trained professionals who are in day to day observation of their classrooms, While lawyers and judges may disagree, none of the affidavits is so inherently improbable that it is lacking in value as evidence.[16]

In *King,* affidavits were submitted of a similar nature. Dr. Fred H. Bremer, Superintendent of the District and President of Saddleback College, who has had considerable academic training (B.S., M.Ed., Ph.D) and wide experience in education, filed an affidavit stating among other things:

> "Based upon my academic training and administrative experience, I am of the opinion that dress codes which include regulations applicable to male hair styles are desirable for junior colleges. Such codes aid in maintaining an environ-

[16]One of the affiants, the District Director of Driver & Safety Education, also had eleven years of teaching Industrial Arts Woodworking and Automotive classes. After giving examples of safety hazards of men with long hair he concludes: "In conclusion, long hair can be an extreme safety hazard in many situations unless hair nets, clips, ribbons etc. are worn. [He previously averred that boys would not wear them]. Long hair on male students also tends to create a less serious atmosphere, more waisted [sic] time, more discipline problems, more class distractions and ***LESS EDUCATION.***" C.T. 59 (Emphasis in original).

ment which is conducive to learning and in avoiding disruptions of the educative process."

The plaintiffs in *King* submitted affidavits of two administrators, one of a different high school district and one of a different college district, not directly in contradiction of Dr. Bremer, stating the situation at their particular schools. The eleven affidavits in *Olff* were uncontradicted.

Much emphasis was placed upon the fact that no disruption had occurred in either school even though some of the male students wore long hair. Disruption, of course, if related, would be significant. Its absence, however, does not establish that long-haired males cannot be a distracting influence which would interfere with the educative process the same as any extreme in appearance, dress, or deportment. The affidavits in *Olff* clearly show this, and the affidavit of Dr. Bremer in *King* and comments at the hearing on the dress code likewise are to this effect.[17]

This is not a question of preference for or against certain male hair styles or the length to which persons desire to wear their hair. This court could care less. It is a question of the right of school authorities to develop a code of dress and conduct best conducive to the fulfillment of their responsibility to educate, and to do it without unconstitutionally infringing upon the rights of those who must live under it. We do not believe that the plaintiffs have established the existence

[17]Since the cases come to us largely upon the same written record that was before the trial courts, there is no problem of weighing credibility.

of any substantial constitutional right which is in these two instances being infringed. We are satisfied that the school authorities have acted with consideration for the rights and feelings of their students and have enacted their codes, including the ones in question here, in the best interests of the educational process. A court might disagree with their professional judgment, but it should not take over the operation of their schools. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

The judgment granting a permanent injunction in No. 26,452, *King v. Saddleback Junior College District, et al.*, is reversed. The order granting a preliminary injunction in No. 25,132, *Olff v. East Side Union High School District*, is set aside and the case remanded for further proceedings in accordance with this opinion.

Appendix B

In the United States District Court
Northern District of California

No. 52282

Robert Olff, a minor, by and through his Guardian Ad Litem, Mrs. Sonny Olff,
Plaintiff,
vs.
East Side Union High School District,
Defendant.

ORDER

Plaintiff Olff brings an action in this Court for injunctive and declaratory relief to redress the deprivation of a Fourteenth Amendment right, and to obtain damages. We have jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

Plaintiff is a fifteen-year-old student in good standing at James Lick High School, East Side Union High School District, San Jose, California. On September 10, 1969, plaintiff was informed by a school official that he would not be permitted to attend classes until he had his hair cut, because his hair style and length violated a regulation of the East Side

Union High School District, which states in pertinent part:

> Article IV. Personal Appearance, Cleanliness And Neatness Of Dress:
>
> * * *
>
> The following are minimum standards required of all students. . . .
>
> Boys:
>
> * * *
>
> c. Hair shall be trim and clean. A boy's hair shall not fall below the eyes in front and shall not cover the ears, and it shall not extend below the collar in back.

There is little question that school authorities have a legitimate governmental interest in promulgating regulations in order to insure the safety and welfare of high school students. It is a reasonable health regulation to require that a boy's hair be "clean." It would also seem to be a reasonable safety regulation were the school district to specify the circumstances when a boy's hair must be of a certain length, e.g., in a welding class, in an automotive class, in a woodworking class, etc.

But such is not the case here. The school board regulation does not specify particular circumstances when health or safety considerations require a boy's hair to be a certain length, but rather regulate hair length without any reference to the reasons therefor. As Judge Charles Wyzanski stated just this past week in another "haircut" case, *Richards v. Thurston*, Civil No. 69-993-W, D. Mass., September 23, 1969:

The current view is that a state has not upon an arbitrary basis an absolutely unlimited right to refuse opportunities such as education in the public schools, employment in the public service, or other opportunities it offers. Often this, in somewhat circular terms, is referred to as the principle that there is a distinction between constitutional and unconstitutional conditions. At other times, this is said to present the problem of weighing the state's claims or interests against the individual's claims or interests. Order can be defined properly only in terms of the liberties for which it exists, as liberty can be defined properly only in terms of the ordered society in which it thrives. As Albert Camus implied in *The Rebel,* order and liberty must find their limits in each other.

Whatever be the formulation of the governing principles under our Constitution, the duty of a court is to give scope to the state's claims of order, organization, and public purposes yet not to allow such claims to prevail over individual liberty in the absence of a demonstrated rationality in the state's claims. Merely arbitrary choices of states or their official representatives cannot be enforced against any individual's serious claims of liberty. *This is as true of minors as it is of adults. Tinker v. Des Moines School Dist.,* 393 U.S. 503; *Griffin v. Tatum* (M.D. Ala.) 300 F.Supp. 60, 64. *And when the personal liberty claimed by a minor or an adult has a high order of importance the state must make a strong showing of the need of its* curtailment. *United States v. O'Brien,* 391 U.S. 367, 377. [Emphasis added.]

Judge Wyzanski goes on to conclude, at p. 5:

> In summary, the state in the case at bar has no such rational ground for dictating hair style to a pupil in a general high school as to support an official order interfering with his liberty to express in his own way his preference as to whatever hair style comports with his personality and his search for his own identity.
>
> Plaintiff's claim to liberty as to his appearance is entitled to protection from action by the state or its agents both under the broad terms of the "due process" clause of the Fourteenth Amendment (see *Griswold v. Connecticut,* 381 U.S. 479) and under the specific provisions of the Civil Rights Act which treats that claim to liberty as a civil right, 42 U.S.C. § 1983, and gives to the United States District Courts jurisdiction to enforce that right against an interfering agent seeking to exercise state authority. 28 U.S.C. Secs. 1343(3).

The view of Judge Wyzanski, which is the view shared by this Court, finds support in three other recent District Court cases: *Griffin v. Tatum,* 300 F. Supp. 60, 62 (M.D. Ala. 1969) ("the Constitution protects the freedoms to determine one's own hair style and otherwise to govern one's personal appearance."); *Breen v. Kahl,* 296 F.Supp. 702, 705-06 (W.D. Wisc. 1969) ("freedom [in this case, of an adult] to wear one's hair or to wear a beard is constitutionally protected, even though it expresses nothing but individual taste"); and *Zachry v. Brown,* 299 F. Supp. 1360, 1362 (N.D. Ala. 1969) ("classification of male students . . . by their hair style is unreasonable and fails to pass constitutional muster.")

In the present case, defendant school district makes no allegations that plaintiff's hair style is either a health or a safety menace to himself or other members of the school community, yet they assert that it does violate the regulations' limitations on hair length, and therefore is not permissible. In the absence of any limitations confining the school district's hair length regulations to circumstances which warrant such control, this Court holds the regulations to be unconstitutionally overbroad in that they inhibit free expression more extensively than is necessary to achieve legitimate governmental purposes. Besides, this Court finds as a fact that plaintiff's hair is indeed not longer than the regulations permit.

Accordingly, this Court ORDERS as follows:

(1) The defendant East Side Union High School District, its agents, employees and servants, and each of them, are hereby enjoined from enforcing the District's "haircut" regulations as presently written;

(2) The defendant East Side Union High School District, its agents, employees and servants, and each of them, are hereby enjoined from excluding plaintiff Robert Olff from attending James Lick High School by reason of his hair style and/or length.

October 1, 1969.

/s/ Robert F. Peckham
United States District Judge

Original filed October 1, 1969.
Clerk U.S. District Court
San Francisco, Calif.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-498

ROBERT OLFF, a minor, by and through his guardian Ad Litem, Mrs. Sonny Olff,

Petitioner,

vs.

EAST SIDE UNION HIGH SCHOOL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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ROBERT OLFF, a minor, by and through his guardian Ad Litem, Mrs. Sonny Olff,

Petitioner,

vs.

EAST SIDE UNION HIGH SCHOOL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

May the governing board of a public school district enact regulations controlling the length of hair of male students for the purpose of maintaining an environment conducive to learning and of protecting the health and safety of students?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the regulation enacted by the East Side Union High School District and the constiutional provisions set out in the petition, the following California Statutes are involved:

California Education Code, Section 925.

> "The governing board of each school district shall prescribe and enforce rules not inconsistent with law or with the rules prescribed by the State Board of Education, for its own government."

California Education Code, Section 10609.

> "All pupils shall comply with the regulations, pursue the required course of study, and submit to the authority of the teachers of the schools."

STATEMENT OF THE CASE

In addition to the material presented in petitioner's Statement of the Case, the following facts are significant:

1. This action was filed in the District Court on September 22, 1969, at which time the school district was directed to show cause why a preliminary injunction should not issue. [C.T. 14-15]. At the hearing, which was held on September 24, 1969, the school district introduced into evidence numerous affidavits of teach-

ers and administrators in support of the regulation. [C.T. 16-64]. The student, whose hair length was at issue, testified in person. No other witnesses testified at this hearing on the order to show cause.

2. The hair length regulation was adopted by the governing board of the school district, an elected body, pursuant to state law (California Education Code, Section 925), and said regulation applies to all schools within the district.

3. The hair length regulation was reviewed by a committee composed of students, teachers, administrators, and parents from the district. Appendix "A" of Petition, pp. iv-v.

4. The Court of Appeals, in deciding the instant case, concluded:

a. That the hair style of the student was not a badge or symbol of any group, and, consequently, that *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), was inapplicable to the present case. Appendix "A" to Petition, pp. ix-x.

b. The statements in the affidavits from school teachers and administrators were sufficiant to justify the regulation. Appendix "A" to Petition, p. xv.

c. That the absence of a distraction in the school does not establish the fact that boys wearing long hair would not be a distracting influence on the educational process. Appendix "A" to Petition, p. xvi.

d. That the hair length regulation does not infringe on a substantial constitutional right. Appendix "A" to Petition, pp. xvi-xvii.

ARGUMENT

I

A WRIT OF CERTIORARI SHOULD NOT BE ISSUED AS THERE IS NO FINAL JUDGMENT

The only evidentiary hearing in the instant case took place on September 24, 1969, two days after the granting of the order to show cause. (Appendix "A" to Petition, p. vi). The order of the District Court granting a preliminary injunction in favor of the student (Appendix "B" to Petition, p. xxii) was appealed by the school district to the Court of Appeals for the Ninth Circuit. The decision of the Court of Appeals setting aside the order reads as follows:

> "The order granting a preliminary injunction in No. 25,132, *Olff v. East Side Union High School District*, is set aside and the case remanded for further proceedings in accordance with this opinion."

There are numerous instances where this court has refused to take jurisdiction of cases where there is no final judgment.

Brotherhood of L.F.E. v. Bangor & A.R.C., 389 U.S. 327 (1967).

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 257-258 (1915).

Amer. Const. Co. v. Jacksonville Ry., 148 U.S. 372, 384 (1892).

This court has also postponed a determination of its jurisdiction in a particular case until the merits of the case were considered.

Municipal Investors Assoc. v. Birmingham, 316 U.S. 154 (1941).

The decision in the Court of Appeals cannot be considered to be final as was the situation in *Chicago v. Atchison, Topeka & Santa F. Ry.*, 357 U.S. 77 (1958), as there the District Court had only to formally enter the judgment. In the instant case, a trial on the merits has never been held. If such a trial is held, the relief requested by petitioner may become unnecessary. Although this court has issued writs of certiorari in instances where a decision was not final but a conflict existed in the decisions of the Courts of Appeals (*Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-409 [1915]; *Forsythe v. Hammond*, 166 U.S. 506 [1896]), the conflict present here is, at most, only in principle. Factual differences distinguish the cases. (See below)

II

FACTUAL DISTINCTIONS RESOLVE THE APPARENT CONFLICT OF DECISIONS CONCERNED WITH HAIR LENGTH

U. S. Courts of Appeals for the First, Fifth, Sixth, Seventh, and now the Ninth Circuits have considered regulations adopted by public school districts controlling hair length for male students.

Richards v. Thurston, 424 F. 2d 1281 (1 Cir. 1970), cert. denied 400 U.S. 850 (1970).

Ferrell v. Dallas Independent School District, 392 F. 2d 697 (5 Cir. 1968), cert. denied 393 U.S. 856 (1968).

Jackson v. Dorrier, 424 F. 2d 213 (6 Cir. 1970), cert. denied 400 U.S. 850 (1970).

Breen v. Kahl, 419 F. 2d 1034 (7 Cir. 1969), cert. denied 398 U.S. 937 (1970).

Olff v. East Side Union High School District, 9 Cir. 1971, Appendix "A" to Petition.

The decisions in *Ferrell*, *Jackson*, and below in *Olff* have sustained the right of a school district to enact reasonable regulations controlling hair styles. The Courts of Appeals in *Richards* and *Breen* invalidated the regulations. To truly understand the cases, the facts in each case must be examined.

In *Richards*, the Court of Appeals for the First Circuit held that choice of hair length is a liberty protected by the Fourteenth Amendment and that said

sphere of liberty is subject to reasonable intrusions (424 F. 2d 1281, 1284). However, this case was presented to the District Court on extremely sparse facts, each party contending that the other had a burden of proof which it had not met. Consequently, no facts were presented to the lower court by the school district justifying the regulation governing hair length (424 F. 2d 1281, 1282). Without having the benefit of testimony from professional educators, the court held in favor of the student, noting that justification for the regulation was not self-evident and that no evidence of justification was presented (424 F. 2d 1281, 1286).

In *Breen*, the Court of Appeals for the Seventh Circuit determined on the basis of *Griswold v. Connecticut*, 381 U.S. 479 (1965), that a student's choice of hair length and style is a constitutionally protected fundamental right and is subject to limitation only upon a showing of substantial justification. The trial court held that there had been no showing of any possible justification for the school regulation. The appellate court adopted this viewpoint. (419 F. 2d 1034, 1036-37). Furthermore, the majority court in *Breen* distinguished its decision from the one in *Ferrell v. Dallas Independent School District*, 392 F. 2d 697 (5 Cir. 1968), cert. denied 393 U.S. 856 (1968), on the basis that the school district in the *Ferrell* case was able to satisfy the Court of Appeals that the regulation was justified. (419 F. 2d 1034, 1037).

In *Ferrell*, *Jackson*, and *Olff*, the present case, the Courts of Appeals for the Fifth, Sixth and Ninth Circuits concluded that adequate justification for the regulation had been shown, the one element that had been found lacking by the Courts of Appeals for the First and Seventh Circuits in *Richards* and *Breen*.

III

THE RULE PRONOUNCED BY THE COURT BELOW IS REASONABLE AND SOUND

A. Choice of hair length is not a First Amendment right.

Until a student can establish that his hair length constitutes symbolic speech, he is not entitled to First Amendment protection. See, *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969). Merely claiming that his hair style is a symbol is not sufficient. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The Court of Appeals concluded in the instant case that the student did not purport to say anything. (Appendix "A" of Petition, p. x). Consequently, under the facts of the case, a First Amendment right could not be reasonably asserted.

B. Choice of hair length is not a freedom protected by the Fourteenth Amendment.

In *Breen*, the majority Judges placed great weight on *Griswold v. Connecticut*, 381 U.S. 479 (1965), but such emphasis is unwarranted as said case relates to privacy in the home. The lack of logic in expanding the *Griswold* decision to hair length cases was specifically recognized in *Richards v. Thurston*, 424 F. 2d 1281, 1283 (1970), and by the Court of Appeals for the Ninth Circuit in the present case (Appendix "A" to Petition, pp. xi-xii).

CONCLUSION

We think that students in a public school are entitled to an environment conducive to learning. Such an environment does not develop by itself, but is developed in California through regulations adopted by the governing board of a school district, an elected body. Such regulations must be in furtherance of perfecting the educational process and must not unreasonably interfere with the exercise of constitutional rights.

A typical regulation controls the length of hair on male students. Such a regulation is adopted, as here, on the belief that hair beyond a certain length disrupts the educational process and constitutes a health and safety problem.

We respectfully submit that courts should not become involved in the daily operation of school systems or become co-administrators of school districts, as they have neither the time nor the expertise. *Epperson v. Arkansas*, 393 U.S. 97 (1968). This is not to say, certainly, that the courts should not intervene where an infringement of a fundamental constitutional right exists.

We do not think that choice of hair length is a fundamental right, especially where no specific meaning can be given to a particular length of hair. It is completely incomprehensible to elevate every human whim or fancy to the stature of a constitutional right. Surely, the interest of the school district in providing an en-

vironment conducive to learning and in protecting the health and safety of the students outweighs the desire of a male student to wear his hair in any manner he sees fit.

DATED: November 5, 1971.

Respectfully submitted,

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